99 284 AUG 16 1999

No. 99-

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES PAPA,

Petitioner,

v.

KATY INDUSTRIES, INC., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL C. SAUNDERS
Counsel of Record

CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

JOEL A. D'ALBA
ASHER, GITTLER, GREENFIELD, COHEN & D'ALBA
125 South Wacker Drive
Suite 1100
Chicago, IL 60606
(312) 263-1500

BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue
Suite 400
Washington, DC 20005
(202) 662-8350

Attorneys For Petitioner

August 16, 1999.

QUESTION PRESENTED

What is the proper test to determine whether affiliated companies constitute a "single employer" for purposes of coverage under the federal antidiscrimination laws?

PARTIES TO THE PROCEEDINGS

The petitioner is James Papa, who was plaintiff-appellant below.

The respondents are KATY Industries, Inc., and Walsh Press Company, Inc., who were defendants-appellees below.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE SEVENTH CIRCUIT'S TEST IS CONTRARY TO THE BROAD CONSTRUCTION OF THE FEDERAL ANTIDISCRIMINATION STATUTES	7
A. The Seventh Circuit Test is Inconsistent with the Broad Remedial Purpose of the Federal Antidiscrimination Laws	7
B. The Seventh Circuit Test is Unsupported By the Legislative History and the Purpose of the Statutory Exemptions for Small Employers	10

Page

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE CIRCUITS AS TO THE PROPER TEST TO DETERMINE WHETHER AFFILIATED COMPANIES CONSTITUTE A "SINGLE EMPLOYER" UNDER THE ANTIDISCRIMINATION LAWS 12

III. THE COURT SHOULD GRANT CERTIORARI TO ENSURE THAT VICTIMS OF DISCRIMINATION ENJOY FAIR ACCESS TO THE COURTS AND A PROPER REVIEW OF THEIR CLAIMS 15

IV. THE COURT SHOULD GRANT CERTIORARI TO PREVENT THE SEVENTH CIRCUIT'S ERROR FROM CURTAILING ENFORCEMENT OF OTHER FEDERAL LABOR STATUTES 16

Conclusion 17

Appendix A A-1

Appendix B B-1

Appendix C C-1

TABLE OF AUTHORITIES

Cases	Page(s)
Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983)	8, 9, 11, 13
Artis v. Francis Howell N. Band Booster Ass'n, 161 F.3d 1178 (8th Cir. 1998)	13
Baker v. Stuart Broad. Co., 560 F.2d 389 (8th Cir. 1977)	8, 9, 13
Berkowitz v. Allied Stores of Penn-Ohio, Inc., 541 F. Supp. 1209 (E.D. Pa. 1982)	15
Birbara v. Locke, 99 F.3d 1233 (1st Cir. 1996)	10
Brown v. Vitelcom, Inc., 47 F. Supp.2d 595 (D.V.I. 1999)	15
Childs v. Local 18, Int'l Bhd. of Elec. Workers, 719 F.2d 1379 (9th Cir. 1983)	13
Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235 (2d Cir. 1995)	13
Diangi v. Valex, Inc., No. 98 C 2534, 1999 WL 498613 (N.D. Ill. July 7, 1999)	16
EEOC v. GJHSRT, Inc., No. 96-4093 (C.D. Ill. Mar. 12, 1998), *aff'd sub nom, Papa v. KATY Indus., Inc.*, 166 F.3d 937 (7th Cir. 1999)	2, 5
EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621 (D.C. Cir. 1997)	13
Ellis v. Mohenis Servs., Inc., No. Civ. A. 96-6307, 1997 WL 364468 (E.D. Pa. June 18, 1997)	15

Cases	Page(s)
Frank v. U.S. West, Inc., 3 F.3d 1357 (10th Cir. 1993)	14
Herman v. United Bhd. of Carpenters and Joiners of Am. Local Union No. 971, 60 F.3d 1375 (9th Cir. 1995)	13
Johnson v. Flowers Indus., Inc., 814 F.2d 978 (4th Cir. 1987)	14
Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998)	13
Lusk v. Foxmeyer Health Corp., 129 F.3d 773 (5th Cir. 1997)	8, 10
Marzano v. Computer Science Corp., 91 F.3d 497 (3d Cir. 1996)	14
Mas Marques v. Digital Equip. Corp., 637 F.2d 24 (1st Cir. 1980)	13
McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995)	9
McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930 (11th Cir. 1987)	13
Morelli v. Cedel, 141 F.3d 39 (2d Cir. 1998)	11
Moreno v. John Crane, Inc., 963 F. Supp. 72 (D.P.R. 1997)	14
Murray v. Miner, 74 F.3d 402 (2d Cir. 1996)	9
Odriozola v. Superior Cosmetic Distribs., Inc., 531 F. Supp. 1070 (D.P.R. 1982)	14
Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979)	7

Cases	Page(s)
Papa v. KATY Indus., Inc., 166 F.3d 937 (7th Cir. 1999)	*passim*
Papa v. KATY Indus, Inc., No. 95 C 5290, 1998 WL 142390 (N.D. Ill. Mar. 25, 1998), *aff'd*, 166 F.3d 937 (7th Cir. 1999)	*passim*
Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970)	8
Radio & Television Broad. Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255 (1965)	4, 9
Ritter v. Hill 'N Dale Farm, Inc., No. 98 C 2895, 1999 WL 569566 (N.D. Ill. July 28, 1999)	15
Robinson v. Shell Oil Co., 519 U.S. 337 (1997)	8
Rothman v. Emory Univ., 123 F.3d 446 (7th Cir. 1997)	8
Schweitzer v. Advanced Telemarketing Corp., 104 F.3d 761 (5th Cir. 1997)	13
Sibley Mem'l Hosp. v Wilson, 488 F.2d 1338 (D.C. Cir. 1973)	8
Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223 (1983)	8
Stanford v. Brambles USA, Inc., NO. 98 C 1021, 1999 WL 495466 (N.D. Ill. June 30, 1999)	10, 15
Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999)	8

Cases	**Page(s)**
Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990 (6th Cir. 1997)	8, 11, 13
Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995)	11
Trevino v. Celanese Corp., 701 F.2d 397 (5th Cir. 1983)	8, 9, 13
United States Equal Employment Comm'n v. Foster Wheeler Constrs., Inc., No. 98 C 1601, 1999 WL 507397 (N.D. Ill. July 6, 1999)	15
Vodde v. Indiana Mich. Power Co., 852 F. Supp. 676 (N.D. Ind. 1994)	7
Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202 (1997)	9
Wascura v. Carver, 169 F.3d 683 (11th Cir. 1999)	16
York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360 (6th Cir. 1982)	13

Statutes and Rules	**Page(s)**
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	5
Age Discrimination in Employment Act, 29 U.S.C. § 630 (b)	2
Civil Rights Act of 1991, 42 U.S.C. §§ 1981, 1981a	8, 12
Title VII to The Civil Rights Act of 1964, 42 U.S.C. § 2000e(b)	5, 8

Statutes and Rules	**Page(s)**
Americans with Disabilities Act, 42 U.S.C. §§ 12111(5)(A), 12111(10)(B)	2, 4, 11
Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071 (1991).	8
Sup. Ct. R.30(1)	2
Fed. R. Civ. P. 12(b)(1)	3, 4
Fed. R. Civ. P. 56	5

Other Authorities	**Page(s)**
H.R. Rep. No. 101-485(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 303	11

No. 99-

IN THE

Supreme Court of the United States

JAMES PAPA,

Petitioner,

v.

KATY INDUSTRIES, INC., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, James Papa, respectfully prays that a Writ of Certiorari issue to *reverse* the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on February 8, 1999.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 166 F.3d 937 (7th Cir. 1999) and annexed hereto as Appendix A. This decision affirmed the judgment of the United States District Court for the Northern District of Illinois. The District Court's opinion is not officially reported but is unofficially reported at 1999 WL 142390 (N.D. Ill. Mar. 25, 1998) and annexed hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 8, 1999. Petitioner's motion to the Court of Appeals for the Seventh Circuit for rehearing with suggestion for rehearing *en banc* was denied on March 18, 1999; that decision is annexed hereto as Appendix C. An extension of time within which to file this petition until August 15, 1999, was granted on May 17, 1999.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the meaning of the term "employer" under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*

Section 630(b) of the ADEA states in relevant part:

> "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers."

Section 12111(5)(A) of the ADA states in relevant part:

> "The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year,

---

[1] Because August 15, 1999, is a Sunday, the time in which to file this petition was effectively extended to August 16, 1999. Sup. Ct. R. 30(1). The reason for the extension was to unite in this Court the appellate paths of *Papa* and *EEOC v. GJHSRT, Inc.*, No. 96-4093 (C.D. Ill. Mar. 12, 1998), which the Seventh Circuit consolidated on appeal. The EEOC's petition for certiorari is presently due September 11, 1999.

and any agent of such person, except that, for two years following the effective date of this subchapter [July 26, 1992], an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person."

STATEMENT OF THE CASE

James Papa was an employee of Walsh Press Company, Inc. ("Walsh"), from 1983 to 1994. In 1994, Walsh's parent company, KATY Industries, Inc. ("KATY"), ordered Walsh to discontinue one of its production lines. To comply with this directive, Walsh had to lay off some employees. In May 1994, Mr. Papa was informed that his employment would be terminated, and on July 31, 1994, Mr. Papa's employment was in fact terminated. On September 15, 1995, Mr. Papa timely brought suit against Walsh and KATY for discriminatory discharge on the basis of age (under the ADEA) and disability (under the ADA). Walsh and KATY moved for summary judgment on the grounds that Walsh had too few employees to be an "employer" under either the ADEA or the ADA. (Appendix ("App.") B at B-1.) The district court *sua sponte* converted this motion into a motion to dismiss for lack of subject matter jurisdiction and proceeded to resolve factual issues without a hearing under Rule 12(b)(1) of the Federal Rules of Civil Procedure ("F.R.C.P.").

The district court found the following facts: During the relevant time period, Walsh was a wholly owned subsidiary of KATY. In the calendar year 1993, Walsh had 15 or more employees for 20 or more weeks, but did not have 20 or more employees for 20 or more weeks. In 1994, Walsh did not have 15 or more employees for 20 or more weeks. In 1993 and 1994, KATY had more than 25 employees for 20 or more weeks. (App. B at B-3.) Although Walsh did not have the minimum statutory number of employees to be covered by

either the ADEA or the ADA,[2] Mr. Papa maintained that Walsh and KATY constituted a single employer for purposes of determining whether these statutes applied. (App. B at B-8.)

To determine whether Walsh and KATY constituted a "single employer" under the ADEA and ADA, the district court used the four-factor test approved by this Court in *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965), for use in deciding when two nominally distinct entities constitute a "single employer." Under this four-factor test, the district court considered:

1) the interrelation of operations (*i.e.*, common offices, common record keeping, shared bank accounts, shared equipment);

2) common management, common directors and boards;

3) centralized control of labor relations and personnel; and

4) common ownership and financial control.

(App. B at B-10.) Applying these factors, the district court found that Walsh and KATY had some interrelatedness, but not enough to consider them one employer for purposes of the ADEA and ADA. (App. B at B-10, B-11.)[3] Accordingly, the

---

[2] The district court rejected Mr. Papa's argument that the relevant discriminatory act was the July 31, 1994, termination, and that Walsh, therefore, was an employer under the ADA's 15-employee minimum applicable to discriminatory acts taken on or after July 26, 1994. *See* 42 U.S.C. § 12111(5)(A). The district court held that the relevant discriminatory act occurred in May 1994, when the termination was communicated to Mr. Papa, and that, therefore, the ADA's pre-July 26, 1994, definition (requiring a minimum of 25 employees) applied. (App. B at B-9.)

[3] Because it followed the Rule 12(b)(1) standard, the district court did not consider the disputed factual issues identified by Mr. Papa in his summary judgment opposition with respect to each of the four factors.

district court found that Walsh alone was Mr. Papa's employer. Because Walsh did not have the minimum statutory number of employees under either the ADEA or ADA, the district court held that it lacked subject matter jurisdiction to hear Mr. Papa's claims. (App. B at B-12.) On March 23, 1998, the district court entered judgment dismissing Mr. Papa's claims.

On April 22, 1998, Mr. Papa timely appealed the district court's decision to the Court of Appeals for the Seventh Circuit asserting that the district court erred in its determination whether the defendants constituted a "single employer" under the ADEA and ADA. Mr. Papa also argued that the district court erred in converting the summary judgment motion to a motion to dismiss for lack of subject matter jurisdiction. Finally, Mr. Papa asserted that, properly considered under F.R.C.P. 56, the defendants' motion for summary judgment should be denied because there are genuine issues of material fact with respect to the relationship between Walsh and KATY.

The Seventh Circuit consolidated Mr. Papa's appeal with an appeal from *EEOC v. GJHSRT, Inc.*,[4] and heard both appeals pursuant to its jurisdiction under 28 U.S.C. § 1291. On February 8, 1999, the Seventh Circuit affirmed the judgment of the district courts in both cases. The Seventh Circuit framed the issue for appeal as "what test to use to determine whether an employer that has fewer than 15 or 20 employees, and thus falls below the threshold for coverage by the major federal antidiscrimination laws, should be deemed covered because it is part of an affiliated group of corporations that has in the aggregate the minimum number of employees." (App. A at A-

---

[4] *GJHSRT* presented the same "single employer" issue under Title VII to the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* Title VII defines employer almost identically to the ADEA and ADA and covers only employers with 15 or more employees. *See id.* § 2000e(b). The district court in *GJHSRT* also applied the four-factor test and also found that the defendants did not constitute a "single employer." (App. A at A-3.)

1, A-2 (citations omitted).) The Seventh Circuit recognized that the four-factor test was the test usually invoked to answer this question and that, under this test, there was significant integration between Walsh and KATY, including:

- KATY directed Walsh to terminate part of its business, and consequently, some of its employees;
- KATY determined the salaries of Walsh employees;
- KATY's pension plan applied to Walsh employees;
- KATY funded Walsh;
- KATY and Walsh had integrated computer operations;
- Walsh used KATY's checking account rather than having its own; and
- Walsh needed KATY's approval to write checks above a certain amount.

(App. A at A-2.)

Nevertheless, the Seventh Circuit rejected the four-factor test in favor of its own new formulation. Specifically, the Court limited the "single employer" doctrine to three circumstances: (1) where the traditional conditions for piercing the corporate veil exist, (2) where a small employer was split off from a larger affiliated company or group of companies for the express purpose of avoiding liability under the antidiscrimination laws, or (3) where the parent company is the true violator because it directed the discriminatory act, practice or policy of which its subsidiary's employee complains. (App. A at A-5, A-6, A-7, A-8.) In rejecting the four-factor test, the Seventh Circuit criticized it as vague and contrary to the express statutory exemptions for small employers in the antidiscrimination laws. (App. A at A-4, A-5, A-7, A-8.)

The Seventh Circuit also found that the district court erred in treating the motion as one for lack of subject matter

jurisdiction, but held that the error was harmless and that any improperly resolved factual issues were irrelevant to the determination whether Walsh and KATY were a "single employer" under the ADEA and ADA. (App. A at A-11.) Thus, the Seventh Circuit held that although there was significant integration between Walsh and KATY, Mr. Papa was not entitled to the protection of the federal antidiscrimination statutes.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE SEVENTH CIRCUIT'S TEST IS CONTRARY TO THE BROAD CONSTRUCTION OF THE FEDERAL ANTIDISCRIMINATION STATUTES.

The Seventh Circuit's test unlawfully narrows the coverage of the federal antidiscrimination statutes. As a result, the Seventh Circuit's decision is inconsistent with the broad construction and remedial purpose that Congress intended for these statutes. In addition, the Seventh Circuit's decision is unsupported by the legislative history-based rationale upon which it relies.

A. The Seventh Circuit Test is Inconsistent With the Broad Remedial Purpose of the Federal Antidiscrimination Laws.

The provisions of the federal antidiscrimination statutes—the ADEA, ADA and Title VII[5]—are construed liberally to

---

[5] Although Mr. Papa's claims were brought under the ADEA and the ADA, Title VII is also relevant to this inquiry for three reasons. *First*, many of the substantive provisions of the ADEA and ADA were modeled after Title VII. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Vodde v. Indiana Mich. Power Co.*, 852 F. Supp. 676, 678 (N.D. Ind. 1994). Thus, courts have construed these statutes consistently in light of their common language and purpose. *See Evans*, 441 U.S. at 756;

effectuate their broad remedial goals. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (reading Title VII's employee provisions broadly to "maintain[] unfettered access to statutory remedial mechanisms"); *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2157 (1999) (stating that remedial legislation is entitled to liberal interpretation as a matter of statutory construction); *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 & n.3 (5th Cir. 1997); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 425 (8th Cir. 1970); *Armbruster v. Quinn*, 711 F.2d 1332, 1336 (6th Cir. 1983) ("To effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction.").[6] This broad construction includes the term "employer." *See Lusk*, 129 F.3d at 777; *Trevino v. Celanese Corp.*, 701 F.2d 397, 403 (5th Cir. 1983); *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 391 (8th Cir. 1977); *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973). Indeed, "the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities." *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982) (citations and internal quotation omitted), *vacated and remanded on other grounds*, 463 U.S.

Rothman v. Emory Univ., 123 F.3d 446, 451 (7th Cir. 1997). *Second*, Title VII's definition of "employer" is nearly identical to the definitions in the ADEA and ADA. *See* 42 U.S.C. § 2000e(b); *see also Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 n.2 (6th Cir. 1997) ("Because Title VII, the ADEA, and the ADA define 'employer' essentially the same way, we rely on case law developed under all three statutes.") (citation and internal quotations omitted). *Third*, the Seventh Circuit's decision applies to Title VII as well as to the ADA and ADEA because of the companion case. *See supra* note 4 and accompanying text.

[6] Congress' intent to construe the antidiscrimination laws broadly is illustrated by the 1991 Amendments to Title VII that expanded the damages available under that statute. *See* 42 U.S.C. §§ 1981, 1981a. These Amendments were expressly passed in response to restrictive court opinions that unduly narrowed the scope of Title VII. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991).

1223 (1983); *see also Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (rejecting a restrictive reading of the term "employee" for purposes of determining who constitutes an employer under Title VII).

The four-factor test used by the district court is consistent with this broad construction. *See Baker*, 560 F.2d at 392; *Trevino*, 701 F.2d at 403-04. This test, originally formulated by the National Labor Relations Board, was approved by this Court for use in deciding when two nominally distinct entities constitute a "single employer" for labor relations purposes. *Radio & Television Broad. Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (per curiam). Use of this test in the civil rights context makes sense since Title VII was modeled after the National Labor Relations Act ("NLRA"), since the NLRA has a similarly general definition of "employer," and since the four-factor test "seeks to effectuate" similarly "broad and remedial" labor relations goals. *Armbruster*, 711 F.2d at 1336-38; *see also Trevino*, 701 F.2d at 403 & n.9. Indeed, this Court has stated that it considers the NLRA, Title VII, the ADEA and the ADA as part of the same broad "statutory scheme to protect employees in the workplace nationwide." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). Moreover, the four-factor test is uniquely appropriate since it balances the presumption of corporate separateness with the policy aim of imposing antidiscrimination liability when that separateness is abated. "The rationale for the [single employer] exception is the fairness of imposing responsibility on an entity that shares decisionmaking authority with the employing entity." *Murray v. Miner*, 74 F.3d 402, 405 (2d Cir. 1996). Thus, the four-factor test embodies the necessary flexibility to advance the remedial goals of Congress' broad antidiscrimination legislation.

By contrast, the narrow Seventh Circuit test undermines this broad remedial purpose. A straightforward "piercing the corporate veil" test, such as the first condition adopted by the

Seventh Circuit, is "too stringent" because it fails to consider the public policy considerations behind broad antidiscrimination laws. *Lusk*, 129 F.3d at 777 & n.3. Moreover, the Seventh Circuit test erroneously treats civil rights violations the same as any contract case. (App. A at A-7.) This approach ignores the fact that a veil-piercing test is influenced by whether the underlying suit is a contract action or a civil wrong. *See Birbara v. Locke*, 99 F.3d 1233, 1238 (1st Cir. 1996) ("Several courts and commentators have suggested that it should be more difficult to pierce the veil in a contract case than in a tort case."). Additionally, the Seventh Circuit's veil-piercing test is undesirable because it subjects federal antidiscrimination statutes to state law veil-piercing tests that may vary widely; as a result, similarly-situated plaintiffs and employers may face different standards in each state. The second and third conditions of the Seventh Circuit's test are similarly narrow, requiring actual evidence of direct involvement of the parent company. *See Stanford v. Brambles USA, Inc.*, No. 98 C 1021, 1999 WL 495466, at *7 (N.D. Ill. June 30, 1999). Thus, the Seventh Circuit's test improperly restricts the reach of the federal antidiscrimination statutes and runs afoul of Congress' remedial goals.

B. The Seventh Circuit Test is Unsupported By the Legislative History and the Purpose of the Statutory Exemptions for Small Employers.

The Seventh Circuit justifies its new test by selectively interpreting the legislative history behind the exemption for small employers. In fact, however, the Seventh Circuit's test is unsupported by the legislative history and the four-factor test already answers the Seventh Circuit's concerns.

The Seventh Circuit states that the sole purpose of the small employer exemption "is to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at

compliance fail." (App. A at A-5.) Although Congress considered that concern, it was not the only—or even primary—justification for the minimum employee provision. In fact, there were at least three other reasons for limiting the definition of "employer": (1) to allow small family businesses to continue their intimate hiring and employment practices, (2) to protect the economy and competition, and (3) to justify the constitutionality of federal employment legislation under the Commerce Clause. *See Morelli v. Cedel*, 141 F.3d 39, 45 (2d Cir. 1998); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995); *id.* at 1322 (Parker, J., dissenting). By ignoring these other reasons, the Seventh Circuit mischaracterizes the legislative history and the purpose of the small employer exemption.

The Seventh Circuit also overlooks the safeguards already built into the antidiscrimination statutes and the four-factor test to protect small employers from undue burden. *First*, the antidiscrimination statutes contain internal mechanisms to assist and protect small employers subject to these laws. The ADA, for example, contains an "undue hardship" provision that measures an employer's obligations in relation to its available resources. *See* 42 U.S.C. § 12111(10)(B) (considering, among other things, the "overall financial resources of the covered entity," "the overall size of the business" and "the number of its employees"); *see also* H.R. Rep. No. 101-485(II), at 67 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 349-50 (stating that the undue hardship provision "turns on the nature and cost of the accommodation in relation to the employer's resources and operations"). By limiting the circumstances in which small employers can be held liable, the statutes shield small employers from overwhelming liability.

Second, the four-factor test contains checks to ensure that small employers are subject to liability only when they are "highly integrated with respect to ownership and operations" with a larger company. *Armbruster*, 711 F.2d at 1338; *Swallows*, 128 F.3d at 995 (requiring the parent company to

exercise actual control over the subsidiary). For example, the test expressly looks for common operations and finances, the presence of which suggests assistance from the parent company in absorbing the cost of compliance and liability. Coverage would not subject Walsh to "crushing expense," for instance, since KATY funds Walsh and would share in any compliance or liability costs. Small employers without such integration with a larger entity, however, are still exempt. Thus, small employers remain shielded from liability under the four-factor test if they would truly face coverage or liability alone.[7]

In sum, the Seventh Circuit erred by rejecting the four-factor test that is uniquely crafted to carry out the broad purpose of the antidiscrimination laws. The Court should grant certiorari to correct this error and restore the federal antidiscrimination laws to their full implementation.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE CIRCUITS AS TO THE PROPER TEST TO DETERMINE WHETHER AFFILIATED COMPANIES CONSTITUTE A "SINGLE EMPLOYER" UNDER THE ANTIDISCRIMINATION LAWS.

To date, at least five circuits—the Second, Fifth, Sixth, Eighth and Ninth—have expressly and repeatedly adopted the four-factor test to determine whether affiliated companies constitute a single employer for purposes of the ADEA, ADA

---

[7] Moreover, although it might seem unlikely that large employers would subdivide into smaller divisions to avoid the antidiscrimination laws, it is plausible that they would subdivide to avoid the damage caps created in the 1991 Amendments to Title VII, 42 U.S.C. § 1981 *et seq.* By subdividing into smaller divisions of 15, an employer can lower its potential compensatory and punitive damages liability under Title VII from $500,000 to only $50,000. *See* 42 U.S.C. § 1981a(b)(3). This incentive to subdivide makes the existence of smaller employers more likely, and increases the importance of applying the proper test. Indeed, as the Seventh Circuit recognized, "the cumulative effect of discrimination by many small firms could be substantial." (App. A at A-5.)

and Title VII. *See Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1241 (2d Cir. 1995) ("We believe that the appropriate test under Title VII for determining when parent companies may be considered employers of a subsidiary's employees is the four-part test adopted by the Fifth, Sixth, and Eighth circuits."); *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 (5th Cir. 1997) (reaffirming its adoption of the four-factor test in *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983)); *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993-94 (6th Cir. 1997) (citing *Armbruster v. Quinn*, 711 F.2d 1332, 1337-38 (6th Cir. 1983) and *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982)); *Artis v. Francis Howell N. Band Booster Ass'n*, 161 F.3d 1178, 1184 (8th Cir. 1998) (reaffirming its adoption of the four-factor test in *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 392 (8th Cir. 1977)); *Herman v. United Bhd. of Carpenters and Joiners of Am. Local Union No. 971*, 60 F.3d 1375, 1383 (9th Cir. 1995) (citing adoption of the four-factor test in *Childs v. Local 18, Int'l Bhd. of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983)). Four other circuits—the First, Tenth, Eleventh, and District of Columbia—have applied the four-factor test without expressly adopting it. *See Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24, 27 (1st Cir. 1980); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1070-71 (10th Cir. 1998) (recognizing its use of the test in numerous cases and stating that "[t]he trend in Title VII cases appears to be in favor of adopting [the four-factor] test"); *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987) (applying the four-factor test and calling it the "predominant trend" in determining whether two businesses should be treated as one under Title VII); *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 625-26 (D.C. Cir. 1997).

Courts that have not adopted the four-factor test tend to rely simultaneously on a number of tests, including the four-factor test. For instance, the Tenth Circuit has identified as many as four tests and refused to adopt any as exclusive. *See*

Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993). Courts in the First Circuit follow a variety of approaches without differentiating because the First Circuit "apparently consider[s] all of them to be useful." *Odriozola v. Superior Cosmetic Distribs., Inc.*, 531 F. Supp. 1070, 1075-76 & n.4 (D.P.R. 1982). Similarly, the Fourth Circuit looks at the parent's degree of control over its subsidiary and considers the factors of the four-factor test without "adopt[ing] such a mechanical test in every instance." *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 981 & n.* (4th Cir. 1987). None of these circuits, however, has rejected the four-factor test.

The Seventh Circuit's wholesale rejection of the four-factor test has effectively created a three-way circuit split with respect to the "single employer" doctrine: those that expressly follow the four-factor test, those that use the four-factor test as one of several inquiries, and one that rejects the four-factor test altogether. As a result, victims of discrimination are subjected to different treatment based solely on the fortuity of where they bring suit. Similarly, those who discriminate are treated differently depending on where they happen to be. In fact, where an employer has divisions in different states, that same employer may be subject to different standards where those states fall into different circuits.[8] This disparate treatment will inevitably result in unequal access to the courts, forum shopping, and confusion among the lower courts.[9] The Court

---

[8] For example, an employer with divisions in Indiana and Ohio would face the four-factor test in its Ohio division (the Sixth Circuit) but the more restrictive veil-piercing test in Indiana (the Seventh Circuit).

[9] This confusion already exists. District courts in the First Circuit, for example, do not agree on whether to abide by the four-factor test. *Compare Odriozola*, 531 F. Supp. at 1075-76 & n.4 (stating that the First Circuit has not adopted any one approach and applying a variety of tests) *with Moreno v. John Crane, Inc.*, 963 F. Supp. 72, 75 (D.P.R. 1997) (stating that the First Circuit has adopted the four-factor test). Similarly, although the Third Circuit has stated that it has given no guidance as to which test to follow, *Marzano v. Computer Science Corp.*, 91 F.3d 497, 513 (3d Cir. 1996),

should grant certiorari to resolve this circuit split and ensure similar justice for all victims of discrimination.

III. THE COURT SHOULD GRANT CERTIORARI TO ENSURE THAT VICTIMS OF DISCRIMINATION ENJOY FAIR ACCESS TO THE COURTS AND A PROPER REVIEW OF THEIR CLAIMS.

As a legal matter, this case involves the important issue of when an employer should be subject to antidiscrimination liability. As a practical matter, however, this case is about an individual's access to the courts. If the Seventh Circuit test goes unchecked, countless victims of discrimination (like Mr. Papa) will be denied the right to have their claims considered under the proper, more flexible four-factor test. Ultimately, this will result in fewer valid discrimination claims being remedied. Indeed, in just six months since the Seventh Circuit's decision, at least three more plaintiffs have had discrimination claims dismissed under the restrictive and erroneous Seventh Circuit test. *See Ritter,* 1999 WL 569566, at *3-*4; *Foster Wheeler Constrs.*, 1999 WL 507397, at *6-*7; *Stanford*, 1999 WL 495466, at *7. The Court should grant certiorari to correct the Seventh's Circuit error and to ensure that plaintiffs are not deprived of the opportunity to have their discrimination claims fairly evaluated. Without such review,

---

district courts in that circuit have varied between adopting the four-factor test, *see Brown v. Vitelcom, Inc.*, 47 F. Supp.2d 595, 600 (D.V.I. 1999) (calling the four-factor test the "weight of authority"); *Ellis v. Mohenis Servs., Inc.*, No. Civ. A. 96-6307, 1997 WL 364468, at *6 (E.D. Pa. June 18, 1997), and applying a variety of tests that are of "little substantive difference," *see Berkowitz v. Allied Stores of Penn-Ohio, Inc.*, 541 F. Supp. 1209, 1215 (E.D. Pa. 1982). This confusion is exacerbated by the fact that district courts in the Seventh Circuit now ignore the four-factor test and apply a different standard altogether. *See Ritter v. Hill 'N Dale Farm, Inc.*, No. 98 C 2895, 1999 WL 569566, at *3 (N.D. Ill. July 28, 1999); *United States Equal Employment Comm'n v. Foster Wheeler Constrs., Inc.*, No. 98 C 1601, 1999 WL 507397, at *6-*7 (N.D. Ill. July 6, 1999); *Stanford,* 1999 WL 495466, at *7.

proper enforcement of the federal antidiscrimination statutes cannot be accomplished.

IV. THE COURT SHOULD GRANT CERTIORARI TO PREVENT THE SEVENTH CIRCUIT'S ERROR FROM CURTAILING ENFORCEMENT OF OTHER FEDERAL LABOR STATUTES.

The Seventh Circuit's decision not only threatens to impact enforcement of antidiscrimination laws, but also risks curtailing enforcement of other federal labor statutes. Already, the Seventh Circuit's decision has been interpreted by lower courts as eradicating the four-factor test for other federal statutes, such as the Family and Medical Leave Act ("FMLA"). In *Diangi v. Valex, Inc.*, No. 98 C 2534, 1999 WL 498613 (N.D. Ill. July 7, 1999), the court extended *Papa* to the FMLA stating: "We recognize that *Papa* directly concerned only antidiscrimination statutes, but its sweep is far broader." *Id.* at *1.[10] Reading *Papa* with this "broad sweep" exacerbates the Seventh Circuit's error by curtailing enforcement of other federal labor statutes. The Court should grant certiorari to prevent further enlargement of the Seventh Circuit's error.

---

[10] This extension of the Seventh Circuit's narrow test is especially troubling in light of the fact that the FMLA defines the term "employer" more expansively than Title VII or the ADA. *See Wascura v. Carver*, 169 F.3d 683, 685 (11th Cir. 1999).

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted to review the decision of the Seventh Circuit Court of Appeals.

August 16, 1999.

Respectfully submitted,

PAUL C. SAUNDERS
Counsel of Record

CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

JOEL A. D'ALBA
ASHER, GITTLER, GREENFIELD,
COHEN & D'ALBA
125 South Wacker Drive
Suite 1100
Chicago, IL 60606
(312) 263-1500

KARIN A. GUIDULI*
CRAVATH, SWAINE &
MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
1401 New York Avenue
Suite 400
Washington, DC 20005
(202) 662-8350

Of Counsel

*Rebecca E. Rapp, a law student at the University of Chicago Law School, also worked on this petition.

APPENDIX A

James PAPA, Plaintiff-Appellant,

v.

KATY INDUSTRIES, INC. and Walsh Press Company, Inc., Defendants-Appellees.

Equal Employment Opportunity Commission, Plaintiff-Appellant,

v.

GJHSRT, Inc., et al., Defendants-Appellees.

Nos. 98-2009, 98-2185.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 4, 1998.

Decided Feb. 8, 1999.

Rehearing and Suggestion for Rehearing En Banc
Denied March 18, 1999.

Before POSNER, Chief Judge, and BAUER and EVANS, Circuit Judges.

POSNER, Chief Judge.

We have consolidated for decision two appeals that raise the same issue. That issue is what test to use to determine whether an employer that has fewer than 15 or 20 employees, and thus falls below the threshold for coverage by the major

federal antidiscrimination laws, 42 U.S.C. § 2000e(b) (Title VII of Civil Rights Act of 1964) (15 employees); 42 U.S.C. § 12111(5)(A) (Americans with Disabilities Act) (15 after 1994); 29 U.S.C. § 630(b) (Age Discrimination in Employment Act) (20), should be deemed covered because it is part of an affiliated group of corporations that has in the aggregate the minimum number of employees. The parties treat the issue, as have previous cases to address it, as one of federal common law.

In the first case that we review today, James Papa brought suit under the age-discrimination and disabilities laws against Katy Industries, Inc. and its wholly owned subsidiary Walsh Press Company, Inc. Papa was employed by Walsh, which had too few employees to be covered by the laws under which Papa is suing. Katy, however, the parent, has numerous subsidiaries, employing in the aggregate more than a thousand employees. Katy ordered Walsh's president to discontinue one of its production lines. To comply with this directive, the president had to lay off some of Walsh's employees. One of the ones he laid off was Papa. The question is whether Papa's "real" employer was Katy, or (it makes no difference in this case) the entire consolidated group, rather than Walsh.

Walsh complies with all the formalities required of a subsidiary that wants to have a corporate identity different from that of its parent. Yet there is—unsurprisingly, considering how small Walsh is—a degree of integration between it and Katy. It is illustrated by the latter's command to Walsh to abandon a part of Walsh's business, requiring layoffs. And there is more. The salaries of Walsh's employees are fixed by Katy, and the employees participate in Katy's pension plan; Katy funds Walsh; their computer operations are integrated; Walsh had the use of certain subaccounts in Katy's checking account rather than having its own bank account; and Walsh needs Katy's approval to write checks of more than $5,000. The district court held, nevertheless, that Katy was not Papa's

employer and hence that the court lacked jurisdiction over Papa's suit.

The facts in the second case are quite similar. The plaintiff—the EEOC suing on behalf of Richard Mueser, a former regional manager of defendant GJHSRT—charged that the company had violated the antiretaliation provision of Title VII by firing Mueser. GJHSRT didn't have 15 employees but is a part of an affiliated group known as the "Frederick Group of Companies," which like Katy has many more employees than is necessary to trigger the coverage of the antidiscrimination laws. Each of the Frederick companies is engaged in a different phase of the trucking business and at a different location, but as with Katy there is a degree of integration. Payroll and benefits are centralized, as are computer operations; the membership of the boards of directors of the two companies overlaps; and employees are moved back and forth among affiliates. The district court, nevertheless, granted summary judgment for the defendants, holding that only GJHSRT was Mueser's employer.

The briefs in these two cases examine four factors, treating none as entitled to more weight than any of the others, to determine whether the nominal employer is part of an "integrated enterprise" and in consequence not allowed to invoke the few-employees exemption. These factors are interrelation of operations, common management, common ownership, and centralized control of labor relations and personnel. We cannot blame the lawyers for structuring their analysis this way, because we and other courts of appeals have often done likewise, *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 678 (7th Cir. 1998); *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 582 (7th Cir. 1994); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1069-70 (10th Cir. 1998); *Artis v. Francis Howell North Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1184 (8th Cir. 1998); *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993-94 (6th Cir. 1997); *Cook v. Arrowsmith*

Shelburne, Inc., 69 F.3d 1235, 1240-41 (2d Cir. 1995); *Herman v. United Brotherhood of Carpenters & Joiners*, 60 F.3d 1375, 1383 (9th Cir. 1995)—though not always. In *EEOC v. Illinois*, 69 F.3d 167, 171-72 (7th Cir. 1995); *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997); *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 765 (5th Cir. 1997), and *Johnson v. Flowers Industries, Inc.*, 814 F.2d 978, 981 n. * (4th Cir. 1987), although the four-factor test is cited or recited, the focus of the opinions is on whether the parent corporation made the personnel decision—committed the discriminatory act—of which the plaintiff was complaining. There is no necessary incompatibility between the two lines of case. The opinion in Lusk explains that the four factors "are examined only as they bear on this precise issue," 129 F.3d at 777, that is, the issue of whether the parent was the real decision maker. In a number of other cases, such as our Sharpe decision, the four-factor test is applied because the parties agreed that it is the right test, but is not endorsed by the court.

There is enough uncertainty about the standard to warrant a fresh look. This is especially appropriate because of the vagueness of three of the four factors (all but "common ownership" and it, as we shall see, is useless); because, being unweighted, the four factors do not yield a decision when, as in the two cases before us, they point in opposite directions; and because the test was not custom-designed for answering exemption questions under the antidiscrimination laws, but instead was copied verbatim from the test used by the National Labor Relations Board to resolve issues of affiliate liability under the laws administered by the Board. *Rogers v. Sugar Tree Products, Inc.*, *supra*, 7 F.3d at 582; *Armbruster v. Quinn*, 711 F.2d 1332, 1336-38 (6th Cir. 1983); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977).

The place to start in rethinking the proper standard is with the purpose, so far as it can be discerned, of exempting tiny employers from the antidiscrimination laws. The purpose is

not to encourage or condone discrimination; and Congress must realize that the cumulative effect of discrimination by many small firms could be substantial. The purpose is to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (reviewing legislative history); *Miller v. Maxwell's International Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). This purpose or policy is unaffected by whether the tiny firm is owned by a rich person or a poor one, or by individuals or another corporation. If a firm is too small to be able economically to cope with the antidiscrimination laws, the owner will not keep it afloat merely because he is rich; rich people aren't famous for wanting to throw good money after bad. So an approach actually hinted at in the EEOC's brief of treating *any* affiliated group of corporations as a single employer of all the employees of all the corporations in the group would lead as rapidly to the destruction of tiny firms as the approach obviously rejected by Congress of applying the antidiscrimination laws to every employer, no matter how few employees he has.

There are three situations in which the policy behind the exemption of the tiny employer is vitiated by the presence of an affiliated corporation; the exemption should be construed to exclude them. The first situation is where, the traditional conditions being present for "piercing the veil" to allow a creditor, voluntary or involuntary, of one corporation to sue a parent or other affiliate, e.g., *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 1885, 141 L.Ed.2d 43 (1998); *Anderson v. Abbott*, 321 U.S. 349, 362-63, 64 S.Ct. 531, 88 L.Ed. 793 (1944); *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 413-16 (7th Cir. 1988); *In re Kaiser*, 791 F.2d 73, 75-77 (7th Cir. 1986); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458- 61 (2d Cir. 1995), the parent or affiliates of the plaintiff's employer would be liable for the

employer's debts. If because of neglect of corporate formalities, or a holding out of the parent as the real party with whom a creditor nominally of a subsidiary is dealing, a parent (or other affiliate) would be liable for the torts or breaches of contract of its subsidiary, it ought equally to be liable for the statutory torts created by federal antidiscrimination law. In such a case the parent by its actions has forfeited its limited liability. This approach is conventional in discrimination cases where the employee of a subsidiary seeks to affix liability on the parent for reasons unrelated to the subsidiary's being within the exemption for employers who have only a few employees. *Harrington v. Aetna-Bearing Co.*, 921 F.2d 717, 718 (7th Cir. 1991); *Marzano v. Computer Science Corp.*, 91 F.3d 497, 513-14 (3d Cir. 1996); *Johnson v. Flowers Industries, Inc.*, *supra*; *Watson v. Gulf & Western Industries*, 650 F.2d 990, 993 (9th Cir. 1981).

Second, an enterprise might split itself up into a number of corporations, each with fewer than the statutory minimum number of employees, for the express purpose of avoiding liability under the discrimination laws. The division might be accomplished in such a way as to avoid creating the conditions in which the corporate veil is normally pierced. Each subsidiary might be adequately funded and comply with all requisite formalities for separate corporate status, and the group might make clear to all employees and all creditors that they could look only to the particular corporation with which they had dealt for the enforcement of their contractual entitlements. But if the purpose of this splintered incorporation were to elude liability under the antidiscrimination laws, the corporations should be aggregated to determine how many employees each corporation had. The privilege of separate incorporation is not intended to allow enterprises to duck their statutory duties. See *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 85 F.3d 1282, 1288 (7th Cir. 1996); *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449, 461 (7th Cir. 1991); *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 38

F.3d 1467, 1474, 1477 (9th Cir. 1994); cf. *Yosha v. Commissioner*, 861 F.2d 494 (7th Cir. 1988) (substance over form doctrine in tax law).

Third, the parent corporation might have directed the discriminatory act, practice, or policy of which the employee of its subsidiary was complaining. In that event, the parent, provided that the sum of its employees and those of the subsidiary employing the plaintiff exceeded the statutory minimum, would be the violator. This is the holding of *EEOC v. Illinois*; *Lusk v. Foxmeyer Health Corp.*, and *Schweitzer v. Advanced Telemarketing Corp.*, all cited earlier; see also *Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847, 853-54 (2d Cir. 1985); and for the general principle—that limited liability does not protect a parent corporation when the parent is sought to be held liable for its own act, rather than merely as the owner of the subsidiary that acted—see *United States v. Bestfoods*, *supra*, 118 S.Ct. at 1886; *Spartech Corp. v. Opper*, 890 F.2d 949, 953 (7th Cir. 1989); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 756-57 (7th Cir. 1989); *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.*, 31 F.2d 265, 267 (2d Cir. 1929) (L.Hand, J.). *Bestfoods*, which we have now cited twice, was not a discrimination case; nor *Spartech* or any of the other cases we have just cited. But we cannot think of a good reason why the legal principles governing affiliate liability should vary from statute to statute, unless the statute, or the particular policy that animates the statute, ordains a particular test. (The exception is applicable to the National Labor Relations Act, as we shall see.) The basic principle of affiliate liability is that an affiliate forfeits its limited liability only if it *acts* to forfeit it—as by failing to comply with statutory conditions of corporate status, or misleading creditors of its affiliate, or configuring the corporate group to defeat statutory jurisdiction, or commanding the affiliate to violate the right of one of the affiliate's employees. The act requirement is emphasized in our decision in *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, *supra*, 855 F.2d at 413-16, and in numerous other cases across

the full range of American law. See, e.g., *In re Kaiser*, *supra*, 791 F.2d at 75, 77; *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 160 (7th Cir. 1963); *Lowendahl v. Baltimore & Ohio R.R.*, 247 A.D. 144, 287 N.Y.S. 62, 76 (App. Div. 1936); cf. Phillip I. Blumberg, *The Law of Corporate Groups: Substantive Law* § 6.02, p. 114 (1987).

The claim that a group of affiliated corporations is "integrated," the sort of claim that the four-factor test might be thought to support, not only is vague, but is unrelated to the act requirement just explained or to the policy behind the exemption for employers that have very few employees. Firms too tiny to achieve the realizable economies of scale or scope in their industry will go under unless they can integrate some of their operations with those of other companies, whether by contract or by ownership. The choice between the two modes of integration is unrelated to the exemption. Take contractual integration first. A firm too small to have its own pension plan will join in a multiemployer pension plan or will in effect pool with other employers by buying an insurance policy. David L. Gregory, "Mandatory Arbitration and Wealth Distribution: The Policies and Politics of the Multiemployer Pension Plan Amendments Act," 24 *U.C. Davis L.Rev.* 195, 197 (1990); Alicia H. Munnell, *The Economics of Private Pensions* 219 (1982). It will consult an outside law firm, representing many business firms, rather than having a staff of in-house lawyers. It will hire an accounting firm to do its payroll rather than having its own payroll department. It may ask the Small Business Administration for advice on how to maximize its profits by pruning its least profitable operations. None of these forms of contractual integration would subject tiny employers to the antidiscrimination laws, because the integration is not of affiliated firms. Why should it make a difference if the integration takes the form instead of common ownership, so that the tiny employer gets his pension plan, his legal and financial advice, and his payroll function from his parent

corporation without contractual formalities, rather than from independent contractors?

That is all that's involved in the cases before us. There is no suggestion in either one that the business enterprise was splintered into separate corporations in order to defeat the antidiscrimination laws; Walsh, for example, was acquired, not created, by Katy. There is no showing that an ordinary creditor of one of the subsidiaries could pierce the corporate veil and sue the parent corporation or any of the other subsidiaries. There is no suggestion that the parent, or any other affiliate of Walsh's, or the enterprise as a whole formulated or administered the specific personnel policies, or directed, commanded, or undertook the specific personnel actions, of which the plaintiffs are complaining. It is true that Katy in a sense "caused" the firing of Papa by ordering Walsh to curtail its operations; for, had Walsh not curtailed them, Papa would probably not have been laid off, or so soon. But Papa cannot complain of being laid off as such; the antidiscrimination laws do not forbid layoffs. He can complain only if he was selected for layoff on some forbidden ground. Maybe he was, but there is no suggestion that Katy (or any of Katy's other subsidiaries) was responsible for his being selected for layoff, let alone for Walsh's having picked on him for a forbidden reason.

Where a focus on integration makes sense is in the original context of the four-factor test: the determination by the National Labor Relations Board of whether it has jurisdiction over an employer or, even more clearly, what the appropriate bargaining unit is. See, e.g., *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965) (per curiam); *South Prairie Construction Co. v. Local No. 627*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976) (per curiam). If the work forces of two affiliated corporations are integrated, there is an argument for a single bargaining unit covering both of them, and also an argument that they should be combined for

purposes of determining whether the effect on commerce is substantial enough to justify the Board in asserting jurisdiction. But there is no argument for making one affiliate liable for the other's independent decision to discriminate. Courts that have borrowed the four-factor test for use in the discrimination context have, perhaps, been insufficiently sensitive to the bearing of context on the proper formulation of rules of affiliate liability.

Both plaintiffs argue, though only in general terms, that the conditions for piercing the veil are present in these cases, implying that an ordinary creditor could go against the parent corporation (or another sub). The argument is unconvincing. The plaintiffs seem to think that unless a corporate group erects a Chinese wall between affiliates, each affiliate is responsible for the other's debts. That is nonsense. It is true that one corporation will sometimes own another corporation purely as an investment, with no desire to achieve economies of scale or scope by integrating various functions, such as borrowing, legal advice, back-office operations, personnel policies, and higher management. But that is not the usual case, and is certainly not a condition of limited liability. The corporate veil is pierced, when it is pierced, not because the corporate group is integrated, Blumberg, *supra*, § 20.05, but (in the most common case) because it has neglected forms intended to protect creditors from being confused about whom they can look to for the payment of their claims. *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, *supra*, 855 F.2d at 415-16; *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994); *In re Kaiser*, *supra*, 791 F.2d at 75.

So we think the decisions of the district courts in this pair of cases are right and should be affirmed, but there is one loose end. Although the defendants in Papa's case had tendered their argument for the few-employees exemption in a motion for summary judgment, the district judge, thinking the issue jurisdictional, converted it to a Rule 12(b)(1) motion (motion

to dismiss for want of subject-matter jurisdiction) and proceeded to find facts rather than merely to decide whether there was a genuine issue of material fact, which is the determination called for by a motion for summary judgment. The judge was wrong; the issue is not jurisdictional. *Sharpe v. Jefferson Distributing Co.*, *supra*, 148 F.3d at 678, and cases cited there. But the error was harmless. The factual issues about which the parties disagreed, and which may or may not have been improperly resolved by the informal method adopted by the judge, are irrelevant to the view that we take of the proper way to approach the determination of whether an employer who has fewer than the statutory minimum number of employees is, nevertheless, covered by the antidiscrimination laws because of his connections to another employer.

AFFIRMED.

APPENDIX B

James PAPA, Plaintiff,

v.

KATY INDUSTRIES, INC. and WALSH PRESS COMPANY., INC., jointly, severally, and in the alternative, Defendants.

No. 95 C 5290.

United States District Court, N.D. Illinois.

March 25, 1998.

MEMORANDUM OPINION AND ORDER

NORDBERG, District J.

Plaintiff has sued Defendants alleging he was terminated in violation of the Age Discrimination in Employment Act ("A.D.E.A."), 29 U.S.C. § 621, *et seq.*, and the Americans with Disabilities Act ("A.D.A."), 42 U.S.C. § 12101, *et seq.* Before the Court is Defendants' motion for summary judgment.

Defendants seek summary judgment on the grounds that the Court lacks subject matter jurisdiction over this action. Specifically, Defendants argue Plaintiff's employer, Walsh, had too few employees during the relevant period to be an "employer" under either the A.D.E.A. or A.D.A.

I. Legal Standard

Although Defendant's motion is styled as a motion for summary judgment, the Court will consider it as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1).

In general, summary judgment is inappropriate where the claimed grounds for summary judgment are jurisdictional. *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir.1993); Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d § 2713*. As the *Capitol Leasing* court notes, asking the Court to enter judgment on the grounds that the Court lacks jurisdiction "verges on non sequitur." *Id.* Plainly, if the Court does not have jurisdiction, it lacks the authority to enter judgment of any sort. Furthermore, courts specifically addressing Defendant's "employer" argument have done so in the context of a motion to dismiss. *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 579 (7th Cir.1993); *Line v. Fey, Inc.*, 1997 WL 538715, *1 (N.D. Ill. August 27, 1997). Accordingly, the Court will treat Defendant's motion as a motion to dismiss.

In a motion to dismiss for lack of subject matter jurisdiction, where the relevant facts are contested the party asserting jurisdiction bears the burden of establishing the required jurisdictional facts "by competent proof." *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir.1979); *Line*, 1997 WL 538715, *1; *see also*, *Rogers*, 7 F.3d at 577. Thus, Plaintiff cannot avoid dismissal merely by establishing a genuine issue of material fact. *Line*, 1997 538715, *1; *Lumpkin v. United States*, 791 F. Supp.. 747, 749 (N.D.Ill.1992). Instead, Plaintiff must prove by "a preponderance of the evidence or 'proof to a reasonable probability' that jurisdiction exists." *NLFC, Inc. v. Devocom MidAmerica, Inc.*, 45 F.3d 231, 237 (7th Cir.) (quoting *Gould v. Artisoft, Inc.*, 1 F.3d 544, 547 (7th Cir.1993)).

I. Findings of Fact

Based on the record before the Court, the Court finds the following facts.

A. Plaintiff's Employment with Walsh

Defendant Walsh Press Company, Inc ("Walsh") hired Plaintiff James Papa on May 2, 1983. In a meeting near the end of May 1994, Walsh's president, Jerome W. Heyda, informed Papa and other Walsh employees that they would be discharged on June 30, 1994 or July 31, 1994 as part of a reduction-in-force. Papa, in fact, was discharged on July 31, 1994.

In 1993, the calendar year prior to Plaintiff's discharge, Walsh employed fifteen or more employees for twenty or more weeks, but did not employ twenty or more employees for twenty or more weeks. In 1994, Walsh did not employ fifteen or more employees for twenty or more calendar weeks. In both 1993 and 1994, KATY employed more than twenty-five employees for twenty or more calendar weeks.

B. Relationship Between Walsh and KATY

When Walsh hired Plaintiff, Walsh was an independent company. However, in October 1987 Defendant KATY Industries, Inc. ("KATY"), through its subsidiary American Gage & Machine ("AG & M"), acquired Walsh. Until April 1996, Walsh was a wholly-owned operating subsidiary of KATY. In April 1996, nearly two years after Plaintiff's discharge, Walsh sold its assets and became a non-operating subsidiary of KATY. KATY has various operating and non-operating subsidiaries, which KATY organizes into three principal operating groups: Industrial Machinery, Industrial Components, and Consumer Products. Walsh is part of KATY's Industrial Machinery Group.

Despite their parent-subsidiary relationship, Walsh and KATY maintained separate operations. The companies had separate offices and equipment and shared neither warehouse nor manufacturing facilities. In fact, during Papa's tenure with Walsh, Walsh's facilities were in Forest Park, Illinois while KATY's were in Elgin, Illinois and, subsequently, in

Englewood, Colorado. KATY and Walsh also maintained separate corporate and financial records. Walsh's financial records were maintained by Walsh Vice President Walter Lane and other Walsh personnel.

For the most part, Walsh and KATY had separate and distinct management. Heyda and Lane were primarily responsible for day-to-day management of Walsh; both are Walsh employees and neither was directly employed by KATY. Heyda, who hired Plaintiff in 1983 and was Walsh's president at all times relevant to this action, was specifically responsible for Walsh's employment and labor relations decisions. Heyda testifies that he did not require KATY's approval regarding those decisions. Heyda has never been employed by KATY directly. (He was, however, an officer for another KATY subsidiary.) While certain KATY employees were involved in overseeing Walsh, none were actively involved in Walsh's day- to-day management. In 1993 and 1994, two individuals were officers of both Walsh and KATY. J. Russell Jones was Walsh's treasurer and Paul Kurowski was Walsh's secretary. However, Jones and Kurowski were not involved in Walsh's day-to-day operations or Walsh's employment and labor relations decisions. In 1993 and 1994, no individual was a director of both Walsh and KATY. (As Plaintiff points out, Walsh and KATY shared additional officers and directors after Plaintiff was terminated; however, the relationship between Walsh and KATY in years following Plaintiff's termination is not relevant to this action.)

To be sure, the separation between Walsh and Katy was not absolute. First of all, KATY had substantial financial control over Walsh. KATY maintained a central "cash concentration" account from which its subsidiaries, including Walsh, were allowed to draw. KATY established limits on the amounts that a subsidiary could transfer from the account at a given time, but Heyda testifies that these limits were readily skirted by writing multiple checks for a given transaction rather

than a single check. KATY monitored its subsidiaries' use of the account by maintaining a subaccount for each subsidiary. As Walsh was unprofitable during its entire operating history under KATY, Walsh consistently had a negative subaccount balance. Thus, KATY regularly provided Walsh with funds necessary for Walsh to continue operating. Ultimately, Walsh's balance was "zeroed out" some time following Plaintiff's discharge. In essence, Walsh never repaid the "loans" from KATY. Therefore, the Court finds that KATY had substantial financial control over Walsh, but that Walsh did retain day-to-day control in that it could access funds, up to a limit, without KATY's prior approval.

Second, KATY performed certain administrative functions for its subsidiaries, including Walsh. For instance, KATY served as administrator of a "consolidated" 401K pension plan for KATY and its "participating" subsidiaries. Walsh was a participating subsidiary in this plan. Similarly, KATY maintained insurance policies for its subsidiaries.

Third, KATY required Walsh to prepare an annual operating plan and required approval for bonuses and other expenditures not consistent with the plan. KATY could reject a proposed operating plan and require submission of an amended plan. However, no evidence has been presented indicating that any of Walsh's plans were rejected or modified at KATY's suggestion.

C. Plaintiff's "Belief" Regarding the Identity of his Employer

The Court finds the Plaintiff was aware that Walsh was his nominal employer. Walsh issued Plaintiff's W-2 forms and paychecks, including his severance pay. Plaintiff identified Walsh as his employer on a home equity loan application and as his former employer on his application for unemployment compensation benefits. Additionally, Plaintiff observed Heyda

and other Walsh employees making Walsh's day-to-day operating decisions.

Furthermore, at the time of his discharge Plaintiff was unaware of the evidence he now presents, such as commingling of bank accounts and corporate officials. Plaintiff states he did not know who was in charge of employment matters at Walsh, including who was responsible for hiring and firing employees. Plaintiff also states he did not know the identity of Walsh's and KATY's directors, much less whether the companies shared directors.

D. Decision-Maker in Plaintiff's Discharge

Although Plaintiff argues that KATY effectively made the decision to discharge Plaintiff, the Court finds that Heyda made that decision. The parties agree that the layoff of some of Walsh's employees resulted from a decision to discontinue Walsh's manufacture of presses. However, the parties disagree about who made the latter decision. Plaintiff argues the decision was imposed by KATY, and that Heyda's ensuing decision to terminate Plaintiff and other Walsh employees was a *fait accompli*. On the other hand, Defendant contends Heyda made the decision to discontinue production and whom to discharge as a result.

As only a fraction of Walsh' staff was laid off and Plaintiff does not dispute that Heyda determined which members of Walsh's staff would be laid off, the Court finds that Walsh made the decision to discharge Plaintiff. Even if KATY made the decision to discontinue Walsh's production of presses, that decision did not inevitably lead to Plaintiff's discharge. According to the testimony of both Heyda and KATY's vice president overseeing Walsh's industry, Heyda decided who would stay and who would go. Plaintiff, in fact, knew that Heyda was making the decision; after the decision to discontinue press production and prior to the May meeting,

Plaintiff asked Heyda about whether he would be laid off. Heyda replied that he had not decided yet.

III. Analysis

Under the A.D.E.A. and the A.D.A., "employers" are prohibited from discriminating against employees on the basis of age and disability, respectively. 29 U.S.C. § 623; 42 U.S.C. § 12112(a). However, both the A.D.E.A. and A.D.A. statutes define "employer" so as to exclude particularly small businesses from the statutes' coverage. Under the A.D.E.A., an "employer" is defined as an entity "engaged in an industry affecting commerce" which has twenty or more employees for each working day in each of twenty or more calendar weeks in the calendar year of or the year prior to the alleged discrimination. 29 U.S.C. § 630(b). The A.D.A. defines an "employer" similarly, except that the number of employees required is fifteen, if the alleged discrimination occurred on or after July 26, 1994 (the second anniversary of the statute's effective date), and twenty-five if the alleged discrimination occurred prior to that date. 42 U.S.C. § 12111(5)(A); *Villasenor v. Industrial Wire & Cable, Inc.*, 929 F. Supp. 310, 313-14 n. 4 (N.D.Ill.1996) (applying definition in effect at time of discriminatory act, not at time the action was filed); *see also*, *Landgraf v. U.S.I. Film Products*, 114 S.Ct. 1483 (1994)(law in effect at time of relevant conduct ordinarily applied). An entity which does not meet these definitions is not covered by the prohibitions of the A.D.E.A. or A.D.A. Accordingly, the Court does not have subject matter jurisdiction over an action alleging violation of those prohibitions. *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 579 (7th Cir.1993) (A.D.E.A.); *Line*, 1997 WL 538715, * 2 (A.D.A.).

Defendant contends the Court lacks subject matter jurisdiction over this matter because the alleged discriminatory act occurred in May 1994 and Walsh, Plaintiff's nominal employer, was not an employer under either the A.D.E.A. or A.D.A. Plaintiff, on the other hand, contends the Court does

have jurisdiction for two reasons: (1) Walsh employed a sufficient number of employees to be considered an employer under the A.D.A.; and (2) Walsh and KATY should be treated as a single employer and the combined entity would be an employer under both the A.D.E.A. and the A.D.A. The Court considers Plaintiff's arguments in turn.

A. Walsh as a "Stand-Alone" Employer

Walsh, standing alone, did not have twenty or more employees for twenty or more weeks in either 1993 or 1994, but did have fifteen or more employees for twenty or more weeks in 1993. Accordingly, Walsh, standing alone, was not an employer under the A.D.E.A. and was an employer under the A.D.A. only if the post-July 26, 1994, fifteen-employee definition of "employer" applies. Plaintiff argues the post-July 26, 1994 definition applies; Defendant argues the pre-July 26, 1994 definition applies.

In general, the law in effect at the time of the relevant conduct governs an action. *Landgraf*, 114 S.Ct. at 1497. "[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Id.* (quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1586 (1990) (Scalia, J., concurring)). However, the parties differ on what the relevant conduct was in this action: Defendant contends the alleged discriminatory act occurred in May 1994, when Plaintiff was informed that he would be terminated shortly thereafter as part of a reduction-in-force; Plaintiff contends the discriminatory act occurred when he was actually terminated, on July 31, 1994. Accordingly, the parties disagree as to whether the pre- or post-July 26, 1994 definition of "employer" applies in this action.

Although the Seventh Circuit has not ruled on this precise issue, related case law suggests the relevant conduct was Walsh's decision to terminate Plaintiff and its communication

of that decision to Plaintiff. In the context of determining when the statute of limitations begins to run in A.D.A. and other civil rights cases, the Seventh Circuit has held the clock begins to run when the "injury" is suffered. In the case of discharge, the injury is suffered when the termination decision is communicated to the employee, not when the employee is actually terminated. *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir.1995); *Graehling v. Village of Lombard, Illinois*, 58 F.3d 295, 296-97 (7th Cir.1995). More broadly, the Seventh Circuit has held that "[o]nly the original decision to let the employee go is subject to analysis under the anti-discrimination laws." Graehling, 58 F.3d at 296.

In accordance with these cases, the Court finds that the alleged discrimination occurred in May 1994 and, consequently, the "employer" definition in effect at that time applies in this action. In determining either which law to apply or when to start running the limitations period, the Court is primarily interested in identifying when the employee allegedly suffered a discriminatory act. Hence, the Seventh Circuit's conclusion that the "injury" occurred when the termination decision was communicated is applicable to either determination. Plaintiff's arguments to the contrary are unpersuasive. None of the cases cited by Plaintiff addresses whether the injury occurs on notification or termination, much less which definition of "employer" to use. Indeed, in each case the plaintiff apparently was notified and terminated at the same time, so the courts had no reason to even consider the issue. Therefore, the Court concludes that the law in effect in May 1994, when Plaintiff was informed that he would be terminated, governs this action.

Consequently, the Court finds that Walsh, which standing alone did not employ at least twenty-five employees for twenty or more weeks in either 1993 or 1994, is not an employer under the A.D.A.

B. Walsh and KATY Treated as Single Employer

Two interrelated, but nominally-separate, business entities may be considered a "single employer" for purposes of applying the definition of "employer" in anti-discrimination cases. *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 582 (7th Cir.1993) (applying "single employer" theory to A.D.E.A.). As KATY and Walsh together had well over twenty-five employees throughout 1993 and 1994, if Walsh and KATY are considered a "single employer" the combined entity would be an "employer" under both the A.D.E.A. and the A.D.A.

In determining whether to treat nominally-separate entities as a single employer, the Court considers four factors: (1) interrelation of operations, i.e. common offices, common record keeping, shared bank accounts and equipment; (2) common management, common directors and boards; (3) centralized control of labor relations and personnel; (4) common ownership and financial control. *Id.* Given the purpose of the anti-discrimination laws, "control over the elements of labor relations is a central concern." *Id.* (citing *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir.1983)). In the parent-subsidiary context, as present here, "[w]hen the parent exercises such extensive control over the subsidiary's operations and personnel decisions that, in effect, the two corporations are one, courts are willing to consider the parent along with the subsidiary as the employer subject to the applicable statute." *Id.* However, slight overlaps in operations are not sufficient to warrant application of the single-employer theory. "The showing required to warrant a finding of single employer status has been described as 'highly integrated with respect to ownership and operations." *Id.* at 583 (quoting *McKenzie v. Danvenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir.1987)).

Based on the facts presented above, the Court finds that Walsh and KATY did not have "highly integrated" operations

and, consequently, they should not be considered as a single employer. Physically, the facilities of Walsh and Katy were miles apart. Perhaps more importantly, KATY exercised little day-to-day control over Walsh's operations. Heyda was primarily responsible for Walsh's day-to-day decisions, including those involving labor relations. In particular, Heyda made the decision to discharge Plaintiff. While KATY certainly was involved in monitoring Walsh's financial performance and strategic decision-making, such as the decision to cease Walsh's production of presses, this type of involvement does not establish the necessary degree of interrelatedness to warrant applying the single-employer theory. Indeed, such involvement is undoubtedly typical for parent-subsidiary relationships. More than such "normal" interrelatedness is required to find that the parent and subsidiary should be considered as one. *Armbruster*, 711 F.2d at 1337 (cited approvingly by *Rogers*, 7 F.3d at 583).

Plaintiff's arguments to the contrary are unpersuasive. Aside from arguing that the interrelationships were substantial, an argument the Court considered above, Plaintiff argues he had a "justifiable belief" that Walsh and Katy were a single employer and, therefore, Walsh and KATY should be treated as a single employer. The Court does not agree that such a belief, alone, is sufficient to warrant application of the single-employer theory. The *Rogers* court quotes Armbruster as holding that "the most important requirement is that there be sufficient indicia of an interrelationship ... to justify the belief on the part of an aggrieved employee that the affiliated corporation is jointly responsible for the acts of the immediate employer." *Rogers*, 7 F.3d at 583. However, the *Rogers* court then focuses on the four-factor, objective test in evaluating whether to treat the two companies in question as a single employer. Furthermore, the Court finds that Plaintiff did not have such a "justifiable belief." Plaintiff knew that Walsh was his nominal employer and he was in a position to know that Heyda was responsible for Walsh's day-to-day operations.

Also, Plaintiff's deposition testimony establishes that he was unaware of most of the evidence he now presents regarding the supposed interrelationships between Walsh and KATY. Accordingly, even if Plaintiff believed Walsh and KATY were tightly interrelated, he fails to establish that his belief was justified by what he knew at the time of the discharge decision. To the extent that Plaintiff argues his after-acquired knowledge is relevant to determining whether his belief was "justifiable", the Court finds that the objective, four-factor test is the more appropriate means of considering this information.

Therefore, the Court rejects Plaintiff's argument that Walsh and KATY should be treated as a single employer and considers only Walsh's employment figures in determining whether it is an "employer" within the meaning of the A.D.E.A. or A.D.A. As the Court found above, in 1993 and 1994 Walsh had an insufficient number of employees to be an employer under either the A.D.E.A. or A.D.A. Accordingly, the Court finds it does not have subject matter jurisdiction over this action and dismisses the action pursuant to F.R.C.P. 12(b)(1).

III. Conclusion

For the foregoing reasons, the Court dismisses this action for lack of subject matter jurisdiction.

APPENDIX C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

March 18, 1999

Before

Hon. Richard A. Posner, Chief Judge

Hon. William J. Bauer, Circuit Judge

Hon. Terence E. Evans, Circuit Judge

JAMES PAPA, *Plaintiff-Appellant,*	}	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 98-2009 v.	}	
KATY INDUSTRIES, INC. AND WALSH PRESS COMPANY, INC., *Defendants-Appellees.*	}	No. 95 C 5290
	}	John A. Nordberg, *Judge.*

ORDER

On February 22, 1999, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore **DENIED**.